84-1011

Office-Supreme Court, U.S.
FILED
DEC 24 1984
ALEXANDER L. STEVAS,
CLERK

No.

IN THE
SUPREME COURT
OF THE UNITED STATES OF AMERICA

October Term, 1984

STEPHEN D. OLIPHANT,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether or not Petitioner was denied due process of law where:

(a) Petitioner made a timely and specific request for exculpatory materials;

(b) the government admitted that the requested documents were exculpatory and useful for the preparation of an economic defense to the price fixing charges against Petitioner;

(c) the documents were never reviewed by the trial Court or the Court of Appeals;

(d) the documents were never made available to Petitioner; and

(e) the Court of Appeals, relying on *United States v. Agurs*, held that Petitioner had not met his burden of proving that the requested materials might have affected the outcome of the trial notwithstanding that Petitioner had never been given the opportunity to see the documents and hence *ipso facto* was precluded from meeting the burden imposed by the Court?

2. Whether the decision of the Third Circuit that the trial Court need not review admittedly exculpatory material before denying a request for disclosure of that material presents a conflict among the Circuits particularly where the Fifth Circuit has held that such materials must be reviewed by the trial Court *in camera* before deciding not to disclose the materials?

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Petitioner, Stephen D. Oliphant, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on August 24, 1984, affirming the judgment of United States District Judge, John P. Fullam.[1]

OPINIONS BELOW

The Opinions of the United States Court of Appeals for the Third Circuit have not been reported. The Memorandum Opinion of the Court filed August 24, 1984 ap-

1. Daily Corporation and James Russell were parties to the proceedings in the Third Circuit.

pears in the Appendix hereto beginning at page A-16. The Third Circuit's Order Amending Opinion dated September 28, 1984 appears beginning at page A-22. The Order denying Petition for Rehearing dated October 18, 1984 appears at page A-26. The Opinion of United States District Court Judge John P. Fullam is not reported. It appears in the Appendix hereto beginning at page A-1.

JURISDICTION

This Petition is addressed to the discretion of the Court inasmuch as it is filed sixty-six (66) days after the date of the Order denying Petitioner's Petition for Rehearing on October 18, 1984.[2] *See, Taglianetti v. United States,* 394 U.S. 316 (1969). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The trial Court had original jurisdiction of this matter pursuant to 18 U.S.C. §3231.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land of naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person

2. Counsel for Petitioner, immediately upon receipt of the Order of the Third Circuit denying Petitioner's Petition for Rehearing, advised Petitioner that the Petition for Certiorari was to be filed within ninety (90) days. On the sixtieth day, petitioner requested that the Petition for Certiorari be filed. Counsel at that time recognized that the sixty (60) day time limit was applicable and so advised Petitioner. Petitioner nevertheless requested that this Petition be filed, invoking the Court's discretion to hear what is believed to be a due process issue of first impression: whether a defendant in a criminal case may be required to prove the materiality of admittedly exculpatory documents without ever having been given access to those documents.

be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Where a defendant has never been given access to materials which the government has admitted are exculpatory (useful for impeachment and in the preparation of an economic defense) and where the documents have never been reviewed by any Court, may the defendant nevertheless be required to prove that the documents might have affected the outcome of his trial in order to establish a violation of due process under *Brady v. Maryland*? This issue has never been decided. It arises here on the following facts.

Petitioner Stephen D. Oliphant, the President and Chief Executive Officer of Roth Steel Tube Company seeks reversal of a jury verdict rendered on January 21, 1981 finding him guilty of conspiring to fix prices of electric weld steel tubing in violation of Section 1 of the Sherman Act.

The action was instituted through an indictment handed down on December 14, 1979 charging a total of

seven individuals and nine corporations with participating in a conspiracy through the Welded Steel Tube Council to fix the prices of welded steel tubing east of the Mississippi River over a period of at least seventeen years. The indictment also charged that the defendants conspired among themselves and with other unindicted and unnamed co-conspirators.

Recognizing that this highly competitive and highly fractionalized industry was composed of over 100 manufacturers of electric weld steel tubing, the vast majority of which are concentrated in the eastern United States, and recognizing further that the charges in the indictment spanned more than seventeen years, including at least nine years prior to Petitioner's entry into the industry, Petitioner filed a detailed request for a bill of particulars (48a).[3] These detailed requests sought to ascertain the geographic limits of the indictment, which had been defined by the government only as the area between the Mississippi River and the Atlantic Ocean. Specifically, the requests sought such basic information as the identity of individuals with whom Mr. Oliphant allegedly conspired as well as the specific time frames for the alleged participation and the specific accounts that he discussed with his alleged co-conspirators. At the same time, Petitioner filed a Motion under *Brady v. Maryland* requesting 23 specific categories of documents held by the government and previously submitted to the grand jury by third-party midwestern competitors of Petitioner (33a).

In response to Petitioner's request, the government filed a voluntary bill of particulars which made clear that Petitioner entered the industry nine years after the alleged conspiracy began, and over five years after the last alleged meeting of the conspiratorial council took place. It was therefore necessary for the government to prove that Mr. Oliphant knowingly and willingly joined the

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3. All references to the parties' Joint Appendix filed in the Third Circuit appear as "____a."

Welded Steel Tube Council conspiracy through telephone conversations in which members informed each other of the prices being charged at specific accounts, pricing to be charged at those accounts in the future, and general across the board price increases being contemplated. Based on the government's disclosures in its voluntarily bills of particulars, Mr. Oliphant developed an economic defense that his employer operated almost exclusively in the market west of the Appalachian Mountain chain while all of the other indicted and unindicted named co-conspirators operated almost exclusively in a separate eastern market. He also developed an analysis of the competition at each specific account on which he allegedly conspired to fix prices. That analysis demonstrated that in each case the telephone conversations with these eastern competitors necessarily were legal price-verification calls by the competitors in cases where Mr. Oliphant's employer had taken away all or substantially all of the business from its alleged co-conspirators.

Petitioner had hoped to bolster this economic defense by obtaining the requested *Brady* materials concerning Petitioner's midwestern competitors to show that the midwestern market in which Petitioner competed was separate, independent and subject to a different pricing structure than the eastern market in which all of the other alleged conspirators participated. The *Brady* requests included the competitive indicia of a non-conspiratorial market, dissimilarity of actual prices charged, price quotations, price increase announcements and effective dates, changes in market shares among competitors, discounting from price lists and announced price increases, among others, for a number of other midwestern competitors which would substantiate the proof offered at trial by Mr. Oliphant that he did not conspire with the other indicted and unindicted coconspirators. The government agreed that certain categories of the third-party documents constituted *Brady* materials and would be useful to the presentation of an economic defense *and to im-*

peach the credibility of government witnesses. (90-91a). Without reviewing the documents, the trial Court refused to release them to Petitioner.

At trial, the key government witness suggested that Mr. Oliphant was the link between the conspiracy east of the Appalachian mountains and certain midwest companies. It was the documents of these midwest companies which the government conceded to be exculpatory but which were never produced to Petitioner or reviewed by any Court.

In his post-trial Motions and on appeal, Mr. Oliphant claimed that he was convicted based on the unrefuted allegations that he was a link to midwest companies. Mr. Oliphant claimed that this prejudicial testimony could have been refuted if he had had access to the third-party documents to impeach the government's key witness.[4]

In denying Petitioner's post-trial Motions, the trial Court again failed to conduct an *in camera* review of the admittedly exculpatory grand jury documents and merely speculated that the documents would not have met the main thrust of the government's case. The trial Court also failed to apply or articulate any standard to determine whether or not the requested documents were material to the question of Petitioner's guilt under the standards of *Brady v. Maryland*, 373 U.S. 83 (1963) and *United States v. Agurs*, 427 U.S. 97 (1976).

On appeal, the Third Circuit candidly acknowledged that had it been confronted with the request prior to trial it may have decided the issue differently (A-19-20). Nonetheless, the Court declined to conduct an *in camera* review, electing instead to adopt the trial Court's speculative conclusion. Unlike the trial Court, the Court of Appeals did apply a standard of materiality and concluded that the evidence would not have created a reasonable

4. That the documents were exculpatory is clear not only from the government's admission but also from the fact that these same documents, when presented to the grand jury saved the midwest companies from a grand jury indictment.

doubt that otherwise did not exist (A-20). When Petitioner pointed out in his Petition for Rehearing that the Court had applied the standard governing *general* instead of *specific Brady* requests, the Third Circuit filed an Amended Opinion reciting the correct standard and concluding that it could not be said that the requested material "might have affected the outcome of the trial". (A-24). Under the Third Circuit's ruling, Petitioner was required to prove that the requested documents might have affected the outcome of the trial even though he was never given an opportunity to review the documents.

ARGUMENT

A. PETITIONER HAS BEEN DENIED DUE PROCESS BECAUSE HE WAS REQUIRED TO PROVE THE MATERIALITY OF ADMITTEDLY EXCULPATORY DOCUMENTS TO WHICH HE HAS NEVER BEEN GIVEN ACCESS AND WHICH HAVE NEVER BEEN REVIEWED BY ANY COURT

Before this case, no Court had ever required a defendant to prove the materiality of admittedly exculpatory documents without giving the defendant an opportunity to examine those documents or without itself reviewing the documents. In this case, the government acknowledged the existence of specifically requested exculpatory materials (turned over to it by unindicted competitors) which the government admitted would have been useful to petitioner's economic defense *and to impeach key government witnesses*. Notwithstanding this pre-trial admission by the government, the documents were never turned over to the Petitioner because the trial court, without ever reviewing those documents, determined to accede to the unindicted competitors' opposition to disclosure of the documents.

Brady v. Maryland, 373 U.S. 83 (1963) teaches that the prosecution is obliged to turn over to a defendant

exculpatory documents which are material either to guilt or punishment. In *United States v. Agurs*, 427 U.S. 97 (1976) the Court held that the standard for determining materiality was whether or not "the suppressed evidence might have affected the outcome of the trial." 427 U.S. at 104.

In this case, the Third Circuit apparently recognized the validity of Petitioner's request for documents when it stated that "although had we been confronted with Oliphant's *Brady* request prior to trial we may have decided the issue differently. . . ." Nevertheless, the Court held ". . . we are unable to say that the requested material might have affected the outcome of the trial. *Agurs*, 427 U.S. 104." (A 24-25). Thus, the Third Circuit apparently placed on Petitioner the burden of establishing the materiality of documents admitted to be exculpatory which were never disclosed to Petitioner and never reviewed by either the trial Court or the Court of Appeals.

This case represents the first time a Court has ever required a defendant to prove materiality of admittedly exculpatory documents without giving the defendant an opportunity to examine those documents or without itself reviewing the documents. The Third Circuit approach renders meaningless the due process protection enunciated by this Court in *Brady* and *Agurs* because without the documents, the defendant can obviously never meet his burden and, without a review *in camera* of the documents by a Court, there can be no basis for concluding whether or not the documents are material.

Placing on a defendant a burden of proof while at the same time denying defendant the only opportunity to meet the burden cannot be considered due process.

B. THE COURT SHOULD RESOLVE THE DIRECT CONFLICT IN THE CIRCUITS AS TO WHETHER THE TRIAL COURT MUST AT LEAST EXAMINE ADMITTEDLY EXCULPATORY BRADY MATERIALS *IN CAMERA* IF THEY ARE NOT DISCLOSED TO THE DEFENDANT.

The Third Circuit's decision is in direct conflict with the Fifth Circuit's decision in *United States v. Diaz-Munoz*, 632 F.2d 1330 (5th Cir. 1980), which held that where the prosecutor presents the problem of disclosing *Brady* materials to the trial Court to determine whether the materials should be given to the defendant, the trial Court must conduct an *in camera* examination of the materials.

In *Diaz-Munoz*, the defendants were convicted of a conspiracy to defraud an insurance company, embezzlement, mail fraud and filing false tax returns. It was critical to the government's case to show that funds has been laundered through bank accounts of a Panamanian corporation controlled by defendants. Defendants contended that the funds were set up to conduct anti-Castro activities and contained CIA funds. Defendants made a *Brady* request for the government to search the CIA, FBI and Military Intelligence records to substantiate this claim. However, the prosecutor made only a cursory study of excerpts from the CIA files and represented to the Court that while some CIA funds did exist in those accounts, their presence in the accounts was irrelevant because the CIA funds could not be specifically traced. The Fifth Circuit reversed defendants' convictions since the *Brady* request pertained to information that could possibly refute a significant element of the government's case and it was therefore improper for the government to acknowledge the existence of such information based on the cursory examination but fail to disclose it. 632 F.2d at 1333-34.

Similarly, in *United States v. Gaston*, 608 F.2d 607, 614 (5th Cir. 1979), the Court held that it was reversible error for the trial Court to refuse to conduct an *in camera* inspection of certain FBI interview reports which had been sought prior to trial as *Brady* materials. The Court specifically stated:

> "We note that this conviction might not have been subject to attack on *Brady* grounds and that the entire exercise which we have here undertaken could have obviated had the District Court taken time to examine [the *Brady* materials] *in camera*." 609 F.2d q5 614.

The Fifth Circuit's requirement that the trial Court conduct an *in camera* review prior to deciding whether or not admittedly exculpatory material should be disclosed is the only rational interpretation of this Court's instruction in *United States v. Agurs*, 427 U.S. 97, 106 (1975), where the Court authorized the prosecutor to "submit[ ] the problem to the trial Judge." *Id.* at 106. It is obvious that the Third Circuit's interpretation of this instruction to permit a trial Court to make a determination on the materiality of the documents without ever conducting any type of inspection of the documents wholly defeats the review process that *Agurs* mandates when specific *Brady* requests, as in this case, have been made.

The Court should correct the conflict in the Circuits, reverse, and require that the documents be turned over to the trial Court for *in camera* inspection, or to Petitioner, so that Petitioner will have the opportunity to show the materiality of these admittedly exculpatory materials.

CONCLUSION

It is submitted that a writ of certiorari must issue to redress the denial of due process inherent in the holding by the Third Circuit imposing on Petitioner the burden of proving materiality of admittedly exculpatory documents where the documents have never been made available to Petitioner or reviewed by court *in camera*. The ruling conflicts with the Fifth Circuit's holding that an *in camera* inspection by the court is necessary where the documents are not otherwise disclosed.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL
	:	
v.	:	
	:	
BERGER INDUSTRIES, INC., et al.	:	NO. 79-278

MEMORANDUM AND ORDER

FULLAM, J. FEBRUARY 25, 1983

Nine defendants, four corporations and five individuals, stood trial on an indictment charging them (along with other defendants who had previously entered guilty pleas) with conspiring to fix prices in violation of the antitrust laws. One corporation and one individual were acquitted; the remaining seven defendants were convicted, and have filed motions for judgment of acquittal and for new trials.

All of the defendants were charged with participation in a single conspiracy beginning in 1962 or earlier, and continuing to the date of the indictment, December 14, 1979. However, the governing statute of limitations permitted conviction only for activities occurring on or after December 14, 1974. Evidence of conduct before that date was pertinent only for the purpose of shedding light on events which occurred within the limitations period.

The Government presented very strong, direct and explicit evidence of the formation of the price-fixing conspiracy in 1962, when various firms engaged in the welded steel tube industry[1] formed a trade association known as the Welded Steel Tubing Council, Inc. and embarked upon a straightforward program to "stabilize" the industry. The principal disputed issues at trial were

1. Welded steel tubing is made by rolling and welding thin sheets of steel, and is used in the manufacture of such items as floor lamps, bicycles, baby carriages, light-weight furniture, etc.

whether this conspiracy continued in existence during the statutory period (*i.e.*, after December 14, 1974), and whether these particular defendants, many of whom did not enter the industry until the early 1970s, knowingly participated in the conspiracy. In brief, the issue in each case was whether the particular defendant engaged in price-fixing activities after December 14, 1974 and, if so, whether such activity was pursuant to the conspiracy charged in the Indictment.

The three features of the alleged conspiracy identified in the Government's evidence were (1) an agreement to coordinate the amount and timing of generalized price increases; (2) an agreement not to cut prices to particular customers, and to compare and agree upon prices in advance when dealing with shared accounts (but with sufficient minor variations in prices quoted *so as not* to make obvious the antecedent illegality); and (3) agreements to impose specified "extra" charges (for "bright" — *i.e.*, plated — pipe, for cutting pipe to non-standard sizes, and for certain packaging).

The Welded Steel Tube Council held meetings only during the first few years after its formation in 1962; it neither met, nor existed in a formal sense, at any time during the period covered by the indictment. The government's evidence was to the effect that the overall price-fixing arrangements were successfully achieved during the first few years of the Council's existence, and required only telephone communications thereafter; and that the participants, including these defendants, actively carried out the price fixing scheme throughout the indictment period. The pivotal evidence in support of the government's position consisted of the testimony of other defendants who had entered guilty pleas, and unindicted co-conspirators testifying under grants of immunity.

This co-conspirator testimony, much of which is at least partially confirmed by contemporaneous notations of comparative prices, clearly establishes that there was fairly frequent communication among the alleged par-

ticipants in the conspiracy, and that prices were discussed. Indeed, the defendants do not dispute that fact, but argue that nothing more than price-verification or credit-checks was involved, and that no agreement to fix prices was contemplated or carried out.

Other than the testimony of co-conspirators, there is very little solid evidence against these defendants. The government did not attempt to establish, through invoices for example, that the price-fixing scheme was successful. There does emerge from the evidence a pattern of substantially similar across-the-board price increases at about the same times, but this is not particularly surprising given the nature of the industry. The cost of steel represented about 65% of the manufacturer's cost; all of the alleged conspirators purchased their steel in the same market; hence a general increase in steel prices would naturally soon be reflected in the prices charged by the manufacturers of welded steel tube. The evidence concerning price-differentials for "extras" (plated pipe, special cutting, and certain packaging) did not really strengthen the government's case: some of the defendants never manufactured products which qualified for these extra charges, other defendants never imposed such charges, and the economic justification for such charges is fairly evident.

On the other hand, the government was not required to prove that the conspiracy to fix prices, if it existed, was invariably successful, or invariably complied with by the participants. To the extent that the testimony of witnesses sufficed to prove that a particular defendant, during the indictment period, was knowingly engaged in a continuing agreement to fix or stabilize prices, the jury was entitled to credit such testimony and convict the defendant. The witnesses' testimony on that score was more directly incriminating as to some defendants than as to others. It therefore becomes necessary to determine whether the testimony, as to each defendant, was sufficiently direct and unambiguous to support the verdict.

Understandably, the defendants emphasize certain factors tending to undermine the reliability of the government witnesses. Not only were the witnesses themselves guilty of criminal conduct and therefore of dubious credibility, but they were all associated with one or more of the defendants' competitors, in a highly competitive industry. It was to the advantage of firms which had pleaded guilty to the antitrust violations charged in this case to try to incriminate as many of their competitors as possible. But all of these factors were adequately explained to the jury, and I am not at liberty to second-guess the jury's credibility assessments. In short, for present purposes, it must be assumed that all of the testimony of the government witnesses is true. The remaining question is whether, accepting the testimony as correct, it suffices to establish the crime charged.

The government was required to prove, as to each defendant, knowing participation, on or after December 14, 1974, in a conspiracy to fix prices. Proof that information about prices was exchanged, without more, is insufficient to establish the criminal involvement charged here. The "more" may consist of proof that, during the indictment period, a particular defendant actually agreed to fix prices; or, in my view at least, it may also consist of proof that a particular defendant was aware of the agreements reached during the heyday of the Welded Steel Tube Council, and understood that exchanges of price information during the indictment period were in furtherance of the pre-existing conspiratorial arrangement. Stated otherwise, what would be merely price-verification in ordinary circumstances takes on a more sinister cast when engaged in by persons shown previously to have expressly agreed to fix prices in violation of the antitrust laws.

As to all of the defendants who were convicted by the jury, it must be borne in mind that the testimony of government witnesses Hoffman, Behney, Cast and Roth provides ample justification for a finding that those wit-

nesses, and the firms with which they were associated (the leading firms in the industry) fixed prices during the indictment period, and regarded their activities as a continuation of the ongoing conspiracy which began in 1962; and that, from the perspective of those witnesses, their discussions of prices with the remaining defendants, during the indictment period, were for the purpose of carrying out that conspiracy. Thus, for present purposes, the only real question is whether each of the convicted defendants shared that perception. Inferences favorable to the government on that issue are more readily sustainable with respect to defendants shown to have had direct knowledge of or participation in the original conspiracy. It must also be remembered, of course, that perceptions of the conspirator-witnesses not shared by the defendants, and unsuccessful attempts by the conspirator-witnesses to induce others to fix prices, are not enough.

Roth Steel Tube Company and Stephen D. Oliphant. The motion of these defendants for judgment of acquittal appears not to challenge the sufficiency of the evidence against them. In any event, the government's evidence adequately supports the jury's verdict. Roth Steel Tube was a member of and participant in the Welded Steel Tube Council, and very active in price-fixing activities during the early years. When Mr. Oliphant assumed charge of Roth's sales activities, he served as the principal contact with the other conspirators during the 1974-78 period. The government's witness Hofmann testified specifically and in great detail about numerous price-fixing conversations with Mr. Oliphant during that period (N.T. 165-172). These included not only general price increases, but specific agreements to fix prices to as many as 12 different customers shared by the two firms. For example, Hofmann testified to specific price-fixing agreements with respect to the Bilt-Rite account late in 1978, and a similar agreement in 1977 with respect to the Jamey account (N.T.

170-174). Hofmann's testimony was corroborated by Mr. Behney (N.T. 565, 574-575, 623-632).

William Daily. Mr. Daily was one of the originators, and a very active participant in, the Welded Steel Tubing Council. At that time, he was associated with a firm which sold, but did not manufacture, welded steel tube. Later, he entered the manufacturing business. There was a great deal of evidence concerning his price-fixing activities during the early years. He then sold his business and moved to Florida. Later, however, during the indictment period, he returned to the industry as a "consultant" (his version) or perhaps as an officer, of the defendant Tuesday Industries. The government produced substantial testimony to the effect that Mr. Daily engaged in price-fixing activities during the indictment period. The jury could reasonably conclude that these post-1974 activities and discussions were carried out with knowledge of, and in furtherance of, the original price-fixing conspiracy. The testimony of Mr. Behney (N.T. 605-609), Cast (N.T. 790) and Roth (N.T. 932-937) adequately supports the verdict.

Miller Tube Corporation of America and Martin Miller. It is undisputed that, during the indictment period, Martin Miller of Miller Tube discussed and compared prices with the alleged co-conspirators who entered guilty pleas on several occasions. Indeed, there was testimony concerning numerous such discussions, but unfortunately for the government, the dates of many of these conversations was not fixed with sufficient precision to justify a finding that they occurred within the indictment period (the frequent references to "the mid-seventies" is too vague a description to establish that the conversations occurred after December 14, 1974). A few such price-verification communications were shown to have occurred within the indictment period, but the defendants correctly point out that there is no evidence that Miller actually agreed to fix prices during these conversations. Moreover, there was a great deal of defense ev-

idence, which the government made no attempt to refute, establishing that in point of fact Miller Tube was a consistent price-cutter during the indictment period; and there is no evidence that Miller ever conformed its prices to those being charged by its competitors during this period. Were it not for certain additional evidence produced by the government, these defendants would plainly be entitled to judgments of acquittal.

The difficulty with the defendants' position, however, stems from the abundance of evidence showing these defendants' extensive participation in the price-fixing conspiracy during the pre-indictment period. The government's witness Roth, now associated with Berger Industries, was formerly employed by Miller Tube; he testified explicitly and in detail that, while he was employed at Miller, Martin Miller fully explained to him the existence and ramifications of the price-fixing conspiracy, and directed him to carry out price-fixing activities. There was also an abundance of evidence that Martin Miller himself engaged in price-fixing activities on behalf of Miller Tube. In view of that evidence, the jury could properly conclude that, during the indictment period, Mr. Miller was fully aware of the ongoing price-fixing conspiracy, was aware that the competitors with whom he had "price-verification" discussions viewed those discussions as in conformity with the price-fixing agreement, and did not disabuse his competitors of the notion that he was a willing participant therein. There was no evidence that Miller had withdrawn from the conspiracy. In these circumstances, the Miller defendants could properly be convicted of conspiracy notwithstanding the fact that they did not conduct their own business in conformity with the price-fixing arrangement. Membership in the conspiracy was established; there was no withdrawal from the conspiracy; and actions pursuant to the conspiracy were carried out by other members, with the knowledge of these defendants, during the indictment period. The jury's verdict cannot be disturbed.

The Daily Corporation and James Russell. The defendant James Russell incorporated the Daily Corporation in 1971, long after the Welded Steel Tubing Council had ceased overt operations. There was no evidence that anyone other than Mr. Russell acted on behalf of Daily Corporation in any arguably incriminatory way during the indictment period. There was testimony establishing that Mr. Russell had price discussions with the co-conspirators who later pleaded guilty. In contrast to the testimony about other defendants, however, the evidence concerning Mr. Russell's conversations was sparse, vague, and inconclusive. At least one such alleged conversation, it later developed, could not possibly have occurred (it was conclusively established that Mr. Russell was out of the country at the time, and the witness conceded that the communication attributed to Mr. Russell was probably merely a message from one of the witness' own salesmen). There was no proof that Mr. Russell actually agreed to fix prices in any of these alleged conversations. The nearest thing to proof of an express agreement by Mr. Russell consisted of testimony by Mr. Roth about an occasion when Mr. Russell refused to agree, whereupon the witness allegedly informed Mr. Russell "you will have to row your own boat on this one". The government argues that this testimony proves that there must have been other occasions when Mr. Russell did agree to fix prices.

There was no evidence that Mr. Russell or anyone else at the Daily Corporation had any knowledge of the price-fixing agreements forged at the meetings of the Welded Steel Tubing Council.

The government argues that an inference to that effect can be drawn, however, from the fact that William Daily attended Council meetings, and that Mr. Russell worked for Mr. Daily during those years. The government pictures William Daily as Mr. Russell's close friend

and "mentor", and argues that Mr. Daily could be expected to have indoctrinated Mr. Russell concerning the price-fixing scheme.

The government's characterization of the relationship between Mr. Daily and Mr. Russell finds little support in the record; except for the fact that the two men once worked for the same company, the only other evidence is Mr. Daily's acknowledgment that he has known Mr. Russell since the latter was 15 years old.

There is very little else in the record from which an inference of guilt might be drawn. Daily Corporation did not manufacture plated tubing, never imposed an extra charge for packaging, and used its own formula for imposing extra charges for special cuts (a formula totally different from that allegedly agreed upon by the price-fixers). The evidence does establish, and Mr. Russell conceded, that Daily Corporation's generalized price increases were very similar to those of its competitors, and occurred at essentially the same times. As mentioned above, however, these increases occurred in the immediate aftermath of increases in steel prices, and it would be only natural that the manufacturers would pass such increases along to their customers.

In short, evidence tending to establish that Mr. Russell participated in price-fixing activities during the indictment period was insufficient in quantity and quality to enable a reasonable jury to conclude beyond a reasonable doubt that such conduct occurred, and the required inference that Mr. Russell had any awareness of the existence of a price-fixing conspiracy finds no support in the record, apart from impermissible speculation and conjecture. The motion of the defendants' Daily Corporation and James Russell for judgments of acquittal must be granted.[2]

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2. A possible explanation for the jury's verdict against Daily Corporation and James Russell may lie in the fact that there were 9 defendants, there may have been confusion between the Daily Corporation and the defendant William Daily, and the evidence about

Motions for New Trials. In addition to seeking judgments of acquittal, the remaining defendants also seek new trials.

Except for the defendants Daily Corporation and James Russell, the verdicts were not against the weight of the evidence. The Court's charge was not objected to, and in any event was, in my view, correct and adequate.

The defendants Roth Steel Tube and Stephen D. Oliphant argue earnestly, and at great length, that the government conducted this entire proceeding in a manner which deprived the defendants of a fair trial. The defendants sought to require the government to file a further bill of particulars, identifying all persons and firms alleged to have been involved in the conspiracy. The government responded by furnishing the notes of testimony before the grand jury, and assuring the Court and the defendants that the government's theory of the case was fully and adequately reflected in that testimony. It is claimed that the government, shortly before trial, changed its position and presented incriminating evidence of a more far-reaching conspiracy, which the defendants were not adequately prepared to meet. Finally, it is claimed that the Court erred in declining to require the government to disclose alleged "Brady" material. I have carefully considered these arguments, and find them lacking in merit.

It is correct that the government's grand jury evidence related only to a conspiracy to fix prices in the

NOTES *(Continued)*

conversations between the government witnesses and the various defendants was, of necessity, somewhat confusing. It would have been relatively easy for the jury to mis-remember some of this testimony and to conclude that the evidence against Mr. Russell was much more explicit and incriminating than, as a review of the transcipt now discloses, it actually was. Were it not for the grant of the defendants' motions for judgments of acquittal, it would, in my view, be necessary to grant their motions for a new trial in the interest of justice, on the ground that the verdict was contrary to the weight of the evidence, and may have been the result of confusion.

territory east of the Mississippi River. The defendant Roth Steel Tube was engaged primarily in the mid-western region of the country, but was charged by the government in this case with having participated in the conspiracy charged, in connection with its entry into the eastern market. The government did represent, on the basis of the grand jury testimony, that its evidence would be confined to the alleged "eastern" conspiracy. At the time these representations were made, they did reflect the totality of the information available to the government.

Shortly before trial, however, the co-defendants in this case (notably Messrs. Hofmann, Cast and Roth) entered guilty pleas and agreed to cooperate with the government, whereupon the government became privy to additional information relating to price-fixing activities in the mid-western region of the country. But the defendants were not charged in this indictment with having engaged in any "mid-western" conspiracy, they were not tried for such activities, and were not convicted on the basis of any such activities. Indeed, the only reference to any companies not previously identified to the defendants as co-conspirators which occurred in the presence of the jury was a brief mention, in the testimony of Irving Roth (N.T. 907-909) that, in his conversations with Mr. Oliphant, the latter advised him of price changes being made by named mid-western firms competing with Roth Steel Tube in the mid-western region, as a justification for the position being asserted by Mr. Oliphant in the negotiations with the witness. No objection to this testimony was expressed at any time, nor was the Court requested to give a cautionary instruction.

Indeed, even at this late date, I am not aware that a curative instruction would have been appropriate: the testimony does not suggest that Roth's awareness of what its mid-western competitors were charging stemmed from an illegal conspiracy with them; this was not evidence of "other crimes"; and the government's theory of the case was not in any way modified before, during or

after the trial. Since it has never been the government's position that these mid-western companies were involved in the conspiracy charged in this indictment, a bill of particulars, if one had been mandated, would not have disclosed the identities of these mid-western companies.

In the course of the grand jury investigation in this case, the government accumulated a vast amount of documentary material from other firms in the industry (the "Third Party documents"). Included, apparently, are customer-lists, pricing policies, and the like. The defendants sought to require the government to disclose these documents to them, and the government thereupon sought authorization from this Court to disclose these grand jury materials to the defendants, pursuant to Federal Rule of Criminal Procedure 6(e). The owners of the documents objected to disclosure. The government represented to the Court that none of the documents appeared to be exculpatory, but acknowledged that the materials might include information helpful to the defense, in two categories: (1) the documents might lend support to an "economic justification" defense, and (2) some of the documents might contain information which the defendants could utilize in cross-examing government witnesses (or, more accurately, the government could not rule out that possibility). Applying the appropriate balancing test, I concluded that the need for and utility of the documents was greatly outweighed by the prejudice to the third parties if they were disclosed; and I therefore declined to authorize disclosure. It was and is my feeling that the "economic defense" issue would arise, if at all, only in connection with sentencing; and that, in any event, parties responding to grand jury subpoenas should not be exposed to the possibility that sensitive information would thereby become available to their competitors.

The defendants have now asserted a different theory, namely, that these materials were required to be produced under *Brady v. Maryland* because they might dis-

close that firms in the industry not charged with involvement in the price-fixing conspiracy pursued substantially identical pricing policies as the alleged conspirators. Hence, it is argued, the materials may well be exculpatory. The fact is, however, that the government relied primarily upon direct evidence of conspiracy by these defendants to fix prices, and made no significant attempt to base its case upon parallel pricing activities. And the defendants were certainly not precluded from showing that their pricing policies mirrored those of non-conspirators; had they wished to do so, the defendants could readily have subpoenaed the same information from the third parties directly.

The motions for a new trial will be denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL
	:	
v.	:	
	:	
BERGER INDUSTRIES, INC., et al.	:	NO. 79-278

ORDER

AND NOW, this 25th day of February, 1983, upon consideration of the Motions for Judgment of Acquittal and of the Motions for New Trial filed on behalf of the defendants, it is ORDERED:

1. The Motions of the defendants Daily Corporation and James Russell for Judgment of Acquittal are granted, their convictions are set aside, and said defendants are discharged.

2. The post-trial Motions of the remaining defendants are denied.

_____

J.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 83-1215 and 83-1331

UNITED STATES OF AMERICA
Appellant in No. 83-1215

v.

DAILY CORPORATION and
JAMES A. RUSSELL,
Appellees in No. 83-1215

UNITED STATES OF AMERICA

v.

STEPHEN D. OLIPHANT,
Appellant in No. 83-1331

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(Crim. Nos. 79-278-2, 79-278-12 and 79-00278-14)
(Hon. John P. Fullam)

Argued July 19, 1984

Before: ADAMS, HIGGINBOTHAM and VAN DUSEN,
Circuit Judges

(Filed August 24, 1984)

MEMORANDUM OPINION OF THE COURT

ADAMS, *Circuit Judge*

Daily Corporation and James Russell (Daily/Russell) as well as Stephen Oliphant were convicted by a jury for their participation in an industry-wide scheme to fix and maintain prices in violation of section 1 of the Sherman Act. 15 U.S.C. §1 (1982). The United States now appeals the district court's granting of Daily/Russell's motion for acquittal pursuant to Fed. R. Crim. P. 29(c), and urges us to reinstate their convictions. Oliphant appeals the district court's denial of his motion for acquittal and new trial, and alleges that the prosecution's conduct in this case denied him a fair trial.[1] Given the paucity of evidence presented at trial, Daily/Russell's acquittal must be affirmed. In our view the errors alleged by Oliphant do not constitute reversible error, and his conviction will be affirmed.

I.

On December 14, 1979, a grand jury indicted nine corporations and seven individuals for engaging in a conspiracy to fix prices in the electric weld steel tubing market in the "Eastern United States." The indictment was

1. Oliphant claims three incidents of impropriety which he alleges tainted the criminal process beyond repair: that the indictment was constructively amended at trial, thereby violating his Fifth Amendment right to be tried only on those charges presented before a grand jury; that there was a variance between the evidence at trial and that presented at his indictment, in effect denying him adequate notice of the charges against him as required by the Sixth Amendment; and that he was unfairly denied pretrial access to *Brady* materials which were vital to his defense.

subsequently amended to read "those states east of the Mississippi River."[2] Seven of the defendants pleaded guilty prior to trial; of the remaining nine defendants, seven were found guilty of participating in the conspiracy. All of the convicted defendants filed motions for acquittal, and, in the alternative, for a new trial. The district court entered a judgment of acquittal for Daily/Russell, and denied all the other motions.

At trial, evidence was introduced that the alleged conspiracy began sometime in 1962 at a luncheon meeting in New York City involving three of the major steel tube manufacturers. By 1965, an informal price-control system had become well enough established within the industry that meetings were no longer necessary in order to ensure a lack of competition — "everything was done by telephone." App. at 253A. At the time of the indictment, a well-entrenched pattern had emerged: conspirators would call each other regularly to exchange information on customer accounts, to rig bids on mutual contracts, and to discuss and agree upon future price increases in the trade.

Russell was originally employed as a salesman for Daily Tube, then owned by one of the original conspirators, William Daily. After selling Daily Tube, William Daily formed Daily Corporation, which operated in the steel tube industry until 1977, when it underwent a chapter XI reorganization. Russell, while employed by Daily,

2. The original indictment merely tracked the language of § 1 of the Sherman Act, and provided only the names of the indicted conspirators and the type of industry involved. *See* App. at 70A-74A. Prior to trial, Oliphant moved for a bill of particulars in order that the charges against him might be specified in further detail. App. at 48A-74A. In response, the government filed a memorandum opposing the motion, and in the alternative voluntarily provided the district court with a bill of particulars naming additional unindicted co-conspirators, and limiting the conspiracy charged to "those States east of the Mississippi River." App. at 148A; *see* App. at 117A-35A, 145A-51A. The district court thereafter denied Oliphant's motion in light of the government's voluntary bill of particulars. App. at 153A.

was charged with participating in the conspiracy from 1971-77.

Oliphant was president of Roth Steel Tube Co. (RST), an Ohio-based company. Although 80 percent of its sales occurred west of the Appalachian Mountains, App. at 323A-26A, it had acquired numerous accounts in the east coast market by the time of the indictment. App. at 339A-47A. At trial, the government produced several witnesses who testified that from 1970 to 1979 Oliphant had regularly participated in the conspiracy. Oliphant, in turn, presented a lengthy economic defense, claiming that he had vigorously competed against all the conspirators in the eastern market, and had never consciously joined in the antitrust scheme.

II.

Whenever the government chooses to try a defendant for participation in a long-term, ongoing conspiracy, it "shoulder[s] a heavy burden" of proof, and must demonstrate that the defendant "knowingly became a member of the ongoing conspiracy." *United States v. Continental*, 603 F.2d 444, 451, 452 (3d Cir. 1979). In addition, if the conspiracy concerns violations of the Sherman Act, the government must prove that the defendant intentionally violated the antitrust laws. *United States v. Gypsum*, 438 U.S. 422 (1978); *see United States v. Gillen*, 579 F.2d 541 (3d Cir. 1979). The testimony against Daily/Russell was vague and unconvincing,[3] and failed to show either knowing participation or intent. As such, it was legally insufficient to support Daily/Russell's conviction, and it was not error for the trial judge to vacate the jury verdict.

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3. The principal testimony against Daily/Russell was provided by three individuals; the majority of the testimony was discredited, ambiguous, or shown to be contradictory in one form or another. *See* App. at 99A-100A, 107A-09A, 110A-16A, 169A-70A (Roth's testimony); App. at 60A-63A, 66A-68A, 80A-82A (Hoffman's testimony); App. at 89A-90A (Cast's testimony).

Oliphant does not contest the sufficiency of the evidence against him; instead he complains of alleged procedural improprieties. We conclude that the alleged misconduct does not rise to the level of reversible error. It is clear that "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *Stirone v. United States*, 361 U.S. 212, 217 (1959). However, if a court "is sure that [improper evidence] did not influence the jury, or had very slight effect, the verdict . . . should stand." *Kotteakas v. United States*, 328 U.S. 750, 764 (1945). Although in one instance a witness briefly testified that Oliphant had informed him of the activities of various midwestern companies,[4] we do not believe that this evidence was sufficient to induce a jury to convict Oliphant based on participation in a "midwestern" conspiracy rather than on the basis of participation in the alleged "eastern" conspiracy.

In addition, since "the granting of a bill of particulars remains a discretionary matter with the trial court," *United States v. Addonzio*, 451 F.2d 49, 64 (3d Cir. 1972), and the district court here was satisfied with the government's voluntary proffer of a bill of particulars,[5] we conclude that Oliphant was given adequate notice of the charges against him. Furthermore, Oliphant was not unfairly surprised by the trial testimony of government witnesses Roth and Cast because Oliphant was provided with copies of the witnesses' depositions prior to trial which is well before the time required in a criminal proceeding.[6]

Finally, although had we been confronted with Oliphant's *Brady* requests prior to trial we may have de-

4. App. at 317A-19A; *see* app. at 425a-27a; tr. at 884-85.

5. *See* app. at 21a-23a, 145a-53a, 203a-04a.

6. The rules provide that "*[a]fter* a witness other than a defendant has testified on direct examination, . . . the government [shall] produce . . . any statement of the witness that is in their possession." Fed. R. Crim. P. 26.2 (1984) (emphasis added); *see* 18 U.S.C. §3500 (1957) (the Jencks Act).

cided the issue differently,[7] we conclude that the district court's denial was not improper and did not infringe Oliphant's right to due process. *See Brady v. Maryland*, 373 U.S. 83 (1963). In *United States v. Agurs*, 427 U.S. 97 (1976), the Supreme Court declared that although a prosecutor's "failure to make any response" to an accused's pretrial request for specific information "is seldom, if ever, excusable," *Id.* at 106, a prosecutor may still satisfy his *Brady* obligation by "submitting the problem to the trial judge." *Id.* Here, the government chose to turn over all requested evidence to the district court for its decision. The district court applied the appropriate balancing test,[8] and its decision was a reasonable one in light of the various interests involved. Moreover, the requested materials would not have met the main thrust of the government's case.[9] The admission of those materials would therefore not have "creat[ed] a reasonable doubt that did not otherwise exist." *Agurs*, 427 U.S. at 112.

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7. It is possible that, given the three co-defendants' guilty pleas immediately prior to trial, app. at 22a (Mssrs. Hoffman, Cast, and Roth), it might be argued that Oliphant's need for the requested materials outweighed the potential prejudice to the three parties affected. However, the district court's decision at the time was not an unreasonable one. *See* discussion *infra*.

8. *See* App. at 24A-25A.

9. The government's case consisted primarily of direct testimony showing Oliphant's knowing participation in the conspiracy and his intent to violate the Sherman Act. The requested materials consisted of other competitors' economic records, and would not have refuted the government's evidence regarding Oliphant's criminal acts.

III.

Accordingly, the judgment of the district court is hereby affirmed.

TO THE CLERK:

Kindly file the foregoing opinion.

Circuit Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 83-1215 and 83-1331

UNITED STATES OF AMERICA,
Appellant in No. 83-1215

v.

DAILY CORPORATION and
JAMES A. RUSSELL,
Appellees in No. 83-1215

UNITED STATES OF AMERICA

v.

STEPHEN D. OLIPHANT,
Appellant in No. 83-1331

(Crim. Nos. 79-278-2, 79-278-12 and 79-00278-14)

Argued July 19, 1984

Before: ADAMS, HIGGINBOTHAM and VAN DUSEN,
Circuit Judges

(Opinion Filed August 24, 1984)

ORDER AMENDING OPINION

It is ORDERED that the opinion in the above matter be and the same hereby is amended as follows: Pages 7 and 8 are to be replaced by the attached amended pages.

BY THE COURT,

Circuit Judge

DATED: September 28, 1984

with copies of the witnesses' depositions prior to trial which is well before the time required in a criminal proceeding.[6]

Finally, although had we been confronted with Oliphant's *Brady* requests prior to trial we may have decided the issue differently,[7] we conclude that the district court's denial was not improper and did not infringe Oliphant's right to due process. *See Brady v. Maryland*, 373 U.S. 83 (1963). In *United States v. Agurs*, 427 U.S. 97 (1976), the Supreme Court declared that although a prosecutor's "failure to make any response" to an accused's pretrial request for specific information "is seldom, if ever, excusable," *id.* at 106, a prosecutor may still satisfy his *Brady* obligation by "submitting the problem to the trial judge." *Id.* Here, the government concluded that it possessed a number of third-party documents which arguably might be useful to the defendants. Accordingly, in satisfaction of the Supreme Court's mandate in *Agurs*, the government submitted a list of these documents to the district court, recommending that the listed documents "be retained by the Government and made available to all defendants." App. at 91a. The third parties, however, objected to the disclosure of the documents. The district court therefore balanced the need of the third parties against that of defendants and concluded that "the need for and utility of the documents was greatly outweighed by the prejudice to the third parties if they were disclosed." App. at 24a. Consequently, the district

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6. The rules provide that "*[a]fter* a witness other than a defendant has testified on direct examination, . . . the government [shall] produce . . . any statement of the witness that is in their possession." Fed. R. Crim. P. 26.2 (1984) (emphasis added); *see* 18 U.S.C. §3500 (1957) (the Jencks Act).

7. It is possible that, given the three co-defendants' guilty pleas immediately prior to trial, App. at 22a (Mssrs. Hoffman, Cast, and Roth), it might be argued that Oliphant's need for the requested materials outweighed the potential prejudice to the three parties affected. However, the district court's decision at the time was not an unreasonable one. *See* discussion *infra*.

court declined to authorize disclosure. In light of the various interests involved and the nature of the material in the documents, we cannot say that the trial judge's decision was error.[8]

III.

Accordingly, the judgment of the district court is hereby affirmed.

TO THE CLERK:

Kindly file the foregoing opinion.

Circuit Judge

Dated:

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8. Moreover, the requested materials would not have met the main thrust of the government's case. The government's case consisted primarily of direct tesumony showing Oliphant's knowing participation in the conspiracy and his intent to violate the Sherman Act. The requested materials consisted of other competitors' economic records, and would not have refuted the government's evidence regarding Oliphant's criminal acts. Therefore, we are unable to say that the requested material "might have affected the outcome of the trial." *Agurs*, 427 U.S. at 104.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 83-1331

UNITED STATES OF AMERICA

v.

STEPHEN D. OLIPHANT,

Appellant

(Crim. No. 79-00278-14)

Before: ADAMS, HIGGINBOTHAM and VAN DUSEN,
Circuit Judges

(Opinion Filed August 24, 1984)

**SUR PETITION FOR REHEARING
BEFORE ORIGINAL PANEL**

Present: ADAMS, HIGGINBOTHAM, and VAN DUSEN,
Circuit Judges.

The petition for rehearing before the original panel filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

By the Court,

Circuit Judge

DATED: October 18, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 83-1215 and 83-1331

UNITED STATES OF AMERICA
Appellant in No. 83-1215

v.

DAILY CORPORATION and
JAMES A. RUSSELL,
Appellees in No. 83-1215

UNITED STATES OF AMERICA

v.

STEPHEN D. OLIPHANT,
Appellant in No. 83-1331

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(Crim. Nos. 79-278-2, 79-278-12 and 79-00278-14)
(Hon. John P. Fullam)

Argued July 19, 1984

Before: ADAMS, HIGGINBOTHAM and VAN DUSEN,
Circuit Judges

JUDGMENT

These appeals came to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on July 19, 1984.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court entered April 26, 1983 be, and the same is hereby affirmed.

ATTEST:

_____

Chief Deputy Clerk

August 24, 1984

Certified as a true copy and issued in lieu of a formal mandate on October 26, 1984.

Test:_____

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit